City of Chicago
Richard M. Daley, Mayor

Department of Law

Brian L. Crowe
Corporation Counsel

City Hall, Room 511
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-6900
(312) 744-8538 (FAX)
(312) 744-2963 (TTY)
http://www.ci.chi.il.us

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October 29, 1997

Via Federal Express

Mr. William Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of: Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities
MM Docket No. 97-182, FCC 97-296

Dear Mr. Caton:

Enclosed please find for filing an original and nine (9) copies of the Comments of the City of Chicago in this matter. Please arrange for distribution of five of the copies to the Commissioners. I have enclosed an extra copy of the City's Comments to be file stamped and returned to the City's representative.

Very truly yours,

Christopher Torem
Assistant Corporation Counsel

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Preemption of State and Local	)	
Zoning and Land Use Restriction	)	MM Docket No. 97-182
on the Siting, Placement and	)	
Construction of Broadcast	)	
Station Transmission Facilities	)	

To: The Commission

COMMENTS OF THE CITY OF CHICAGO

BRIAN L. CROWE
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
CHRISTOPHER C. TOREM
Assistant Corporation Counsel
JACK A. PACE
Assistant Corporation Counsel

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COMMENTS OF THE CITY OF CHICAGO

The Federal Communications Commission (the "Commission") has requested comments In the Matter of: Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182 issued in connection with the preemption request and proposed rule (the "NAB Petition") by the National Association of Broadcasters and Association for Maximum Service Television ("NAB") and in connection with the Federal Communications Commission Notice of Prospective Rulemaking in the captioned proceeding (FCC 97-296, released August 19, 1997) ("NPRM").

The NAB Petition includes a proposed rule, which is included in the NPRM (the "Proposed NAB Rule"), which seeks a broad preemption of state and local zoning and land use laws related to digital broadcasting and other radio and television transmission facilities. The Commission seeks comments in response to the

Proposed NAB Rule, comments generally on the Commission's preemption authority, and information on local and state laws in an effort to develop a record to determine whether preemption is warranted. The City of Chicago (the "City") submits the following comments as requested by the Commission.

I. Summary of City Position.

The proposed preemptive rule that the Commission is now considering should be rejected on both legal and policy grounds.

As a matter of law, there is no justification for preemption here. No statute expressly authorizes preemption of state and local zoning laws. Section 207 of the Telecommunications Act of 1996 (the "1996 Act") only applies to over the air reception devices and does not apply to transmission towers. At best Section 336 of the 1996 Act requires the Commission to evaluate HDTV within 10 years, but nothing in the statute requires functional towers by any particular date, much less grants the Commission the authority to preempt state or local laws that might prevent HDTV towers from being constructed by any particular date.

As a matter of policy, any preemption related to facilities of this size is premature. Broadcast transmission towers and HDTV towers, in particular, are potentially very tall facilities, the

siting of which may raise a host of legitimate zoning, environmental, aesthetic and safety issues, which are properly handled at the local level.

Finally, the specific rule proposed by the NAB Petition is fatally flawed in a number of respects, as summarized below:

* The proposed rule is far broader than necessary. It covers not only HDTV facilities, but all broadcast facilities.

* The time periods set forth in the proposed rule are unrealistic and inadequate to provide local governments the time to both inform and protect the public.

* By preventing local governments from considering environmental emissions, interference, lighting, painting and marking if federal standards are met, all verification and enforcement responsibility with respect to these issues will be placed on the Commission. Such a rule would place a significant burden on the Commission which may require far more resources than it can properly devote to this issue across the country. Moreover, the proposed rule prevents consideration of aesthetic issues and reduces legitimate attention to neighborhood safety concerns.

* The proposed rule would burden the Commission with alternate dispute resolution responsibilities and compel it to perform as a court of last resort, required to act within 15 days. This time frame will only assist the broadcast industry and may significantly interfere with the right of the populace to petition the government.

* The proposed rule permits the Commission to provide relief within 30 days after permit denial by local authorities, another unrealistic time frame which only favors industry.

II. Statement of Interest.

These comments are filed on behalf of the City as a municipal corporation and on behalf of the 2.7 million people who make the City of Chicago the third largest city in the United States. Chicago has a significant interest in these proceedings since, as one of the ten largest television markets in the United States, the Commission's construction schedule provides for the transmission of HDTV signals in the City as early as November, 1998, just a year away.

In June 1997, the City was approached by a consortium of broadcasters (the "Consortium") seeking consideration for the possible location of a 2000 foot tower within three miles of existing television broadcast facilities in downtown Chicago (the "Project") for the purpose of broadcasting signals for High Definition Television ("HDTV"). The Consortium was seeking to take advantage of the Commission's ruling that the location of new towers within three miles of existing transmission facilities would be a "minor change" for FCC license purposes and, therefore, not trigger additional scrutiny by the Commission in reviewing, among other things, possible interference with other broadcasting towers. Because all television broadcasting in Chicago transmits from either the Sears Tower or the John Hancock building, any digital

transmission solution would need to take into account the height of these two buildings. The Sears Tower is approximately 1500 feet above the ground. The Consortium indicated to City officials that the project would need to move with all possible speed in order to meet the Commission's "voluntary" schedule for WMAQ to begin digital transmissions for HDTV by November 1, 1998. The Consortium further indicated that locating transmission equipment atop existing structures was unacceptable for technical reasons.

In order to assess this proposal as part of its zoning process, the City retained an outside consultant to assist it in evaluating this unprecedented construction project. After certain initial discussions, and in particular, questions raised by the City about the feasibility of using a structure on the Sears Tower rather than building a massive freestanding tower, the Consortium informally indicated that upon further review, it had decided to reexamine existing site possibilities and that a report would be forthcoming on such possibilities.

The City has expressed and continues to express its willingness to work with the Consortium in resolving its need for HDTV transmission facilities. It is to the City's benefit to bring HDTV to Chicago, both because of the potential benefit of the technology to millions of television viewers and because of the

promised return of spectrum called for in the Telecommunications Act of 1996 ("1996 Act") that is likely to benefit the City's technologically innovative 9-1-1 emergency communications system.

III. Background.

The Fifth Report and Order,[1] adopted by the Commission on April 3, 1997 (the "Fifth Report"), sets forth an accelerated schedule for the roll-out of HDTV, with construction of all facilities to be completed by 2003. Fifth Report at ¶ 85. Moreover, stations affiliated with the four major networks in the ten largest television markets (including Chicago) must build digital facilities by May 1, 1999. Fifth Report at ¶ 76. Certain stations, including WMAQ in Chicago, have agreed to meet an even faster schedule and provide a digital signal by November 1998. Id. This aggressive schedule was established, as described by the Commission in the NPRM, because "Congress explicitly indicated its objective of a speedy recovery of spectrum in Section 336(c) of the 1996 Telecommunications Act, 'Recovery of License'." NPRM at ¶ 13.

In answer to concerns raised by the broadcasters that the accelerated schedule might not be feasible from a construction

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[1] Fifth Report and Order in MM Docket No. 87-268, FCC 97-116 (April 21, 1997), 62 F.R. 26996 (May 16, 1997).

perspective, the Commission stated that the rapid schedule for the networks was "reasonable" because it was consistent with annual plans of the large networks and would also meet the Christmas 1998 buying season for digital television sets. Fifth Report at ¶ 76. In the Fifth Report, however, the Commissioner recognized that there could be delays in rapid implementation occasioned by delays in obtaining FAA or zoning approvals, as well as other factors. Fifth Report at ¶ 77. Consequently, the stations which volunteered to the Commission that HDTV facilities would be completed by November 1998 were required to file reports at six-month intervals beginning in November 1997. Those stations were entitled to obtain at least two, six month extensions through the FCC's mass media bureau. However, the Commission was at pains to assure the broadcasters that the accelerated schedule could be met:

> "While we recognize the conversion to digital will impose some burden on broadcasters, we have taken steps to ease broadcasters' introduction of digital service by requiring them at the outset only to emit a DTV signal strong enough to encompass the community of license, and not requiring them to begin transmission to achieve full replication. Many broadcasters will be able to use existing towers for digital transmission and reduce the costs of constructing a DTV facility. Many commentators who argued in favor of a longer construction schedule did so based on their contention that construction of full-replication facilities would require more than six years due to hardware supply constraints, insufficient personnel resources, or lack of adequate new tower sites. However, our construction requirements is satisfied by the emission of a DTV signal strong enough to

encompass the community of license, rather than the more difficult requirement that broadcasters replicate their existing service areas. Therefore, licensees need not initially construct full-replication facilities. We believe that the establishment of a construction requirement that is more easily satisfied, as well as our staggered approach, will alleviate the difficulties raised by some commentators.

One of the most significant issues in converting to digital broadcasting is the construction of new towers or the upgrade of existing towers. As explained above, this burden will be eased by our limited build-out requirement. In addition, while we recognize that there may not be sufficient equipment available in the earliest days to allow for a full-fledged DTV operation to be implemented by all 1,600 television licenses, we are confident that minimal facilities for the handful of licenses in the top ten markets can be assembled in a timely fashion. These facilities need only meet our requirements of serving the community of license, which can be accomplished by the use of existing equipment or prototypes to be introduced soon."

Fifth Report at ¶ 91 and ¶ 92. (emphasis added)

Accordingly, the Commission was confident that "minimal facilities" for the handful of licenses in the top ten markets could be assembled in a timely fashion because of the "limited build-out requirement." In the Sixth Report and Order[2] ("Sixth Report"), the FCC did note, in context of location flexibility, that "existing transmitter sites may not always be available and that use of alternate sites must be accommodated to permit DTV operations." Sixth Report at ¶102. However, the FCC went on to

[2] Sixth Report and Order in MM Docket No. 87-268, FCC 97-115 (April 21, 1997).

state that the impact of moving transmitters within a three mile area "shall be minimal, providing existing antenna patterns are maintained." Id. This last statement was clearly intended to relate to signal interference issues with other sites and not the impact on local land use concerns.

Nowhere in the Fifth Report or Sixth Report are land use considerations discussed in any detail or is any preemption contemplated. Delays occasioned by local land use restrictions were to be taken into account in considering requests for extension of time.

In less than two months after issuance of the Fifth Report and the Sixth Report, the National Association of Broadcasters filed its Petition requesting widespread preemption of local restrictions which could interfere with the rapid deployment of HDTV. The NAB asserted that: "the level of new construction that is required by conversion to DTV is unprecedented in the history of broadcast television." NAB Petition at p. 5. It is expected that 66% of all existing television broadcasters will require new or upgraded towers to support digital television." NAB Petition at pp. 5-6. Moreover, the NAB interpreted the Commission's statement that existing towers may not always be available and that for interference purposes "alternate sites must be accommodated" to

mean that "the Commission has recognized that many television stations will not be able to construct digital facilities at their present transmitter locations." NAB Petition at pp. 5-6. Consequently, the NAB asserted that the Commission "must either preempt certain types of state and local tower siting regulations or abandon its commitment to a rapid conversion to DTV." NAB Petition at p. 16.

At this point the Commission issued the NPRM. The NPRM states that the Commission "believes that some of these state and local regulations may stand as obstacles to the accomplishment of the rapid transition to DTV service and the spectrum recovery it will permit." NPRM, Appendix A, Initial Regulatory Flexibility Analysis. Further, the Commission has stated that the "petitioners have demonstrated that at least some state and local zoning and land use laws, ordinances, and procedures, may, unless preempted by the Commission, prevent television broadcasters from meeting the construction schedule for DTV stations established by the Commission." Id.

IV. Preemption.

The Commission has requested comments as to whether it can properly preempt state or local laws that have the effect of

regulating or restricting the siting and construction schedule of broadcast transmission facilities. NPRM at ¶ 17. Also, to the extent it has preemption authority, the Commission requests comments as to the necessity or advisability of exercising that authority based on the record in this case. NPRM at ¶ 19.

For the reasons stated below, we submit that the Commission lacks authority to preempt state or local laws. Moreover, the City believes there is no basis for the Commission to disturb its previous findings made in the Fifth Report that balanced the congressional objectives set forth in Section 336 of the 1996 Act with local and state health, safety and zoning laws.

As the Commission noted in the NPRM, its authority to preempt state or local law is limited to situations when preemption is expressly authorized by statute, the state or local law is an obstacle to accomplishing the objectives of Congress, or when preemption is necessary to achieve the FCC's purposes within the scope of the FCC's authority. NPRM at ¶ 12. Preemption is permitted when Congress expressly authorizes an agency to preempt state and local laws or when the agency cannot exercise its delegated powers or achieve its congressionally mandated objectives without preempting state and local laws. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, (1992). The burden is on the agency to

demonstrate a preemptive regulation satisfied these standards. NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

The 1996 Act does not provide the Commission with express or implied authority to preempt state or local laws. Only two provisions of the Act have ever been thought to confer preemptive powers -- Sections 207 and 336. We begin with Section 207.

Section 207 of the 1996 Act authorizes the Commission to promulgate regulations "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services". (emphasis added) Thus the statute's language grants authority only over state or local laws affecting reception and not transmission of video programming.

In implementing Section 207, the Commission recognized just this. It limited the application of its preemptive rule to regulations impairing use of antennas "designed to receive television broadcast signals" and other antennas. See FCC 96-328 at ¶ 5.[3] In implementing its regulations for Section 207, the

[3] Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 1B Docket No. 95-59, CS Docket No. 96-83 (August 6, 1996) ("FCC 96-328").

Commission added that "we adhered to the statutory text, which refers only to reception, not transmission devices." Id.

HDTV transmission towers are thus outside the scope of Section 207. As the Commission has recognized, "antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under the rule. Our rule does not apply to transmission devices only." Id. Quite clearly HDTV towers are transmission devices not covered under Section 207 and not antennas installed by television users.

That leaves Section 336. It contains no express preemptive authority, but as we acknowledge above, it would impliedly authorize preemption if state and local zoning laws represented an obstacle to any objective contained in Section 336.

This preemption analysis naturally requires the proper identification of the congressionally mandated federal interest or objective contained in Section 336 that is allegedly threatened by the state and local laws. Although the NAB Petition identifies this federal interest as the "speedy recovery of spectrum", the City respectfully disputes this characterization of Section 336(c) of the 1996 Act as providing the authority to establish an accelerated construction schedule without accommodating state and

local interests.[4] In fact, the 1996 Act does not require the initiation of HDTV broadcasts at any specified date. Thus, the Commission should not preempt state and local laws to speed HDTV according to a schedule that Congress has never adopted.[5] See, 47 U.S.C. § 336(c).

While Section 336 of the 1996 Act expressly provides the FCC with the authority to promulgate rules for the allocation and recovery of broadcast spectrum for the provision of HDTV, nothing in Section 336 creates a federal objective that would necessitate strict adherence to the accelerated construction schedule established by the FCC. 47 U.S.C. § 336. The only relevant time reference found in Section 336 would be Section 336(f), which requires the Commission to conduct an evaluation of advanced television services within 10 years after the date the Commission first issues the licenses for such services. See 47 U.S.C. §

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[4] As the Commission is well aware, this past summer Congress passed legislation that would allow HDTV license holders to continue to hold onto their analog spectrum in the event market penetration for services remains below 85%. Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997) (codified at 47 U.S.C. § 309(j)(14)(A)-(B)).

[5] The Digital Television Act of 1997, which codifies the Commission's roll-out of HDTV was introduced into the Senate as Senate Bill 705, but has never been advanced from the Senate Commerce Committee.

336(f). Since the FCC issued the licenses this year, this evaluation would need to be conducted by year 2007. It is doubtful that this language authorizes any preemption. All it expressly authorizes is that the Commission evaluate the status of HDTV by 2007.

Even if the statute were construed to require implicitly that HDTV be generally available for some time before the FCC would have a sufficient record to conduct such an evaluation, strict adherence to the current schedule is quite ambitious, with some broadcasting concerns scheduled to provide HDTV signals as early as next year, and many others the following year. Certainly, the statute does not suggest that the FCC would need eight or nine years of service experience in order to conduct the evaluation required by Congress. As such, it would appear to the City that the federal objectives that strict adherence to this schedule would be designed to meet are the Commission's, and not those of Congress. Therefore, even if the Commission was to find that compliance with certain local and state laws were in fact an impediment to the broadcast industry adhering strictly to the FCC's construction schedule, this conduct would not frustrate a legitimate federal interest found in any statute. Consequently, any attempt by the FCC to preempt those state or local laws on this basis would be invalid. See Midwest

Video Corp. v. FCC, 571 F.2d 1025, 1040 (8th Cir. 1978), ("Even if a statutory statement of objectives constituted a grant of power, the objectives on which the Commission relies are not those stated in the statute.") aff'd FCC v. Midwest Video Corporation, et al, 440 U.S. 689 (1979). The Commission's asserted justification for preempting state regulation thus cannot stand scrutiny. See, Computer and Communications Industry Assn. v. FCC, 693 F.2d 198, 214(D.C. Cir. 1982) ("To determine whether the Commission acted properly in preempting state [regulation],... one must examine the Commission's powers under the Act and the asserted justification for preempting state regulation.")

The NAB Petition is essentially asking the Commission to reverse its previous determination that properly balanced the federal interests in Section 336 with state and local interests. In its Fifth Report, the FCC expressly provided for extensions of time to be granted to broadcasters for situations when local zoning approval processes (or other causes) required additional time. Fifth Report at ¶ 77. Specifically, the Commission delegated the authority to the Mass Media Bureau to grant two, six month extensions to facilitate this process, reserving the authority to grant extensions greater than one year to the full Commission. Id.

To our knowledge, no broadcaster to date has utilized this

administrative procedure specifically provided by the FCC in response to the alleged obstacles provided by state or local law, or has attempted to utilize them and have concluded that they are inadequate.

Instead, a mere two months after the Commission's Fifth Report was issued, the NAB filed the instant petition seeking to effectively reverse this Commission's prior determination as to the proper balance between federal and local interests, without ever testing the effectiveness of the administrative procedures provided by the Commission. The NAB goes so far as to improperly claim that this Commission "must either preempt certain types of state and local tower siting regulations or abandon its commitment to a swift conversion to DTV." NAB Petition at p. 16. These "options", of course, ignore the fact that this Commission has already concluded that a swift conversion to DTV can be accomplished and local and state interests can be accommodated (through extensions of time) while this conversion takes place. Based on these facts, it is difficult to conceive how, within months of issuing its Fifth Report, the FCC could have a factual basis to reasonably conclude that any state or local law has provided an "obstacle" to the FCC's construction schedule. See, New York State Commission on Cable Television v. FCC, 749 F.2d 804(D.C. 1984), citing Home Box Office,

Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir.) cert. denied 434 U.S. 829 (1977) (court must ensure "both that the Commission has adequately considered all relevant factors .... and that it has demonstrated a rational connection between the facts found and the choice made") (citations omitted).

At a minimum, any preemption analysis conducted by the Commission in this proceeding must take into account that the Commission has already found a year (or more) delay to its construction schedule to be an acceptable amount of delay. Consequently, to lawfully consider a state or local law to be an 'obstacle" to its construction schedule, a finding of delay significantly greater than one year would be necessary. To find otherwise would be arbitrary.

In addition, in any preemption analysis the Commission must not forget that its construction schedule contemplated the construction of minimal facilities necessary to emit a DTV signal strong enough to cover the community of license only, and did not reflect the time necessary to build full-replication facilities. Fifth Report at ¶ 91. Thus, all industry accounts of state or local laws allegedly impairing the ability to meet the construction schedule must be carefully scrutinized for the scope and complexity of the construction project presented.

The Commission must also take into account other recent factors that may impact the "speedy recovery of spectrum". While the Commission considers whether it should preempt state and local regulation to support the accelerated rollout of HDTV, a number of broadcasters appear to be backing off their commitment to HDTV. As reported in the September 12, 1997 Wall Street Journal (attached hereto as Exhibit A) the broadcasters are concerned about the costs of HDTV, the shortage of crews trained to build HDTV towers, and the actual demand from the public for expensive new digital televisions. According to this report, the broadcasters are talking about hybrids of HDTV and conventional TV, causing the use of more signal capacity rather than less, and not providing the DTV service originally promised. Were this result to occur, not only would less spectrum capacity come back for public safety purposes than was originally promised, but the quality of television would not be markedly improved. Moreover, as previously noted, recent legislation was passed by Congress providing for extensions beyond 2006 for returning analog spectrum in the event that, among other things, digital television is not used by at least 85% of the households in a television market. Such an open-ended extension of time for spectrum return, if exercised, could of course significantly delay the return of spectrum or impact the use of

that spectrum by public safety agencies.

As a consequence, the Commission's rationale for the drastic step of local preemption at this time needs to be reexamined in the context of this legislation and the industry's reluctance to move forward based on concerns unrelated to compliance with state and local laws.

V. Broadcast Towers are Unique.

The NAB has asked for the Commission to promulgate a preemption rule based on a handful of cases, only one of which involves HDTV. The NAB has further asserted that the exercise of preemptive authority is consistent with the Commission's actions in other cases and that such preemption will eliminate a host of delays which could prevent the HDTV roll-out from meeting the deadlines set forth in the Fifth Report. In fact, the FCC has never preempted local land use to the degree being sought by the NAB Petition and such preemption is likely to embroil the FCC in litigation with various municipalities so that the target deadlines are not met. The matters cited in the NAB Petition as standing for the proposition that preemption in regard to HDTV towers is business as usual are far from similar.

In the case of amateur station communications, the Commission

wrestled with the conflict between certain local zoning restrictions on amateur radio facilities and the federal interest in encouraging amateur radio and reached a reasonable "accommodation". The local regulations had to represent the minimum practical regulation to accomplish the local government's legitimate purpose of protecting health, safety and aesthetic considerations. A similar rule -- imposing a test that requires state and local governments to show that their laws represent the absolute minimum necessary to protect state and local interests -- is unwarranted here. State and local safety and aesthetic interests are deeply implicated by the Proposed NAB Rule. There is surely a significant difference between a 30 foot ham radio antenna and a 2000 foot television transmitter both in aesthetic appearance and in the potential burdens such a facility places on a neighborhood. The structural and safety concerns which need to be considered in the approval of a television transmitter tower are far greater than the issues presented by an amateur radio antenna. In the City's opinion, HDTV towers of the size and type contemplated have rarely been erected and may present unique structural issues, particularly if numerous station antennas are located on a single tower. Moreover, the ham radio antenna is unlikely to affect air traffic patterns, unlike DTV.

The example of satellite dishes is also not appropriate. In FCC 96-328 and directly pursuant to authority in Section 207 of the 1996 Act to issue regulations "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite service," the Commission set forth a rebuttable presumption that local regulations which impaired the reception by satellite dishes which were one meter or less in diameter and television receiving antennas would be prohibited absent either a clearly defined safety objective applied in a non-discriminatory manner or the preservation of a historic district accomplished through the least burdensome procedure possible. The satellite dishes over two meters in diameter are not subject to any such presumption. FCC 96-328, by comparison with the NAB Petition, did not set forth a presumption of preemption of regulations dealing with larger facilities, nor did it ignore aesthetic concerns or attempt to impose unrealistic timeframes for local response. As stated in FCC 96-328, ¶ 22:

> "Notwithstanding the strong federal policy reflected in Section 207 that reception of over-the-air programming should not be impaired by local regulations, we do not view this policy to be so absolute that it categorically overrides all other concerns. We continue to believe that Congress